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The Impact of Partnership Law on the Legal Profession

Cover Page Footnote

Professor of Law, University of California, Davis. The author is grateful for the excellent research assistance of Jonathan Warner.

THE IMPACT OF PARTNERSHIP LAW ON THE LEGAL PROFESSION*

Robert W. Hillman**

INCREASINGLY, private practice is group practice. The law firm is the principal vehicle through which lawyers associate, pool their professional and financial capital, and participate in the highly competitive market for legal services. The associational form of choice for the organization of the group into the firm is the partnership.¹ Partnership law, in turn, defines the relationships among the principal participants within the firm. This article explores how the regulation of those relationships has shaped the legal profession and the practice of law.

I. THE FIRM AS PROVIDER OF LEGAL SERVICES

Successful firms are more than the sum of their parts and, ideally, survive turnover in their memberships with minimal disruption. They invest heavily in building firm reputations in the hope of building a type of "brand loyalty" and differentiating themselves from the competition. They speak to clients and to lawyers they recruit of their own, unique firm cultures, again in an attempt to differentiate themselves from the competition and foster in their constituencies a sense of loyalty to the firm.

The ongoing quest for firm identity and product differentiation is supported by practices in the profession, if not norms of legal ethics. It is the firm that represents the client, appears on the pleadings, signs the opinion letters, and bills and collects fees for services rendered. It is the firm that signs the office lease, arranges the bank financing, hires and fires employees, and opens or closes the branch office. And

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1. Traditionally, the professional corporation has been the principal alternative to the partnership form of association. The corporate option was developed largely for tax advantages (many of which no longer exist), and courts have tended to apply partnership law in defining the relationships among shareholders in a law corporation. See, e.g., *Fox v. Abrams*, 210 Cal. Rptr. 260, 265 (Ct. App. 1985) (applying partnership law standards to a professional corporation). The *Fox* court observed:

It is well-known that the primary purpose of the laws permitting professionals to incorporate was to allow them to take advantage of various tax benefits available to corporate employers and employees. There is no reason to hold that when lawyers decide to practice together in corporate form rather than partnership, they are relieved of fiduciary obligations toward each other with respect to the corporation's business.

Id. at 265. On application of partnership law to professional corporations, see Robert W. Hillman, *Hillman on Lawyer Mobility* § 6.3 (2d ed. 1998) [hereinafter *Hillman, Lawyer Mobility*].

it is the firm that is the subject of the rankings that appear with increasing frequency in the popular legal press.²

II. THE FIRM AS PARTNERSHIP

Carried to an extreme, an emphasis on the firm as a provider of legal services masks the reality that the essence of the law firm is the people who perform services in the name of the firm. For the sake of the present discussion, these individuals may be assigned to two roughly-defined groups. In most firms, the larger of the two groups will consist of *employees* of the firm. The population of this group includes such disparate actors as clerical staff, paralegals, associates, and perhaps even the ubiquitous "non-equity" partners.³ Members of the employee group exchange their services for a fixed wage and, in some cases, a relatively small share of firm profits. Their relationships with the firm are defined by their contracts as well as by agency law and the myriad of other laws that touch on employment relationships.

Distinct from employees are individuals who have the legal and economic status of *owners*—the partners in the firm. Under the classic, egalitarian model of the partnership, a partner is a co-owner, a residual claimant against the assets and the income stream who bears both the risk of firm failure and the rewards of firm prosperity.⁴ The firm is managed by the partners and for the benefit of the partners. In this technical but important sense, the partnership is the firm, and the firm is the partnership.

The interchangeability of the terms "firm" and "partnership" is supported by statutory law. For example, one would look in vain in either the Uniform Partnership Act ("UPA") or the Revised Uniform Partnership Act ("RUPA") for any reference to "firm." By their silence on this point, the statutes relegate firms to the status of "partnerships," a category broad enough to include associations of bakers or real estate investors as well as lawyers. From an associational perspective, law firms are just another type of partnership, and the relationships among members of the partnership are governed primarily by partnership law.⁵

2. See, e.g., *The Am. Law. 100: America's Highest-Grossing Law Firms in 1997*, *Am. Law.*, July/Aug. 1998, Supp. (ranking by firm name).

3. See *infra* notes 21-22 and accompanying text.

4. Co-ownership is a fundamental characteristic of the partnership form of association. See Unif. Partnership Act § 6(1) (1914), 6 U.L.A. 256 (1995) (defining a partnership as "an association of two or more persons to carry on as co-owners a business for profit . . ."); Rev. Unif. Partnership Act § 101(6) (1996), 6 U.L.A. 27 (Supp. 1998) (same).

5. As a collection of individuals, the partnership is not a homogenous entity. The individuals may be joined by common goals, but they are also motivated by self-interests. Critical partnership decisions are zero sum (or appear to those affected to be such), with one partner's gain being another partner's loss. This is most apparent in decisions concerning allocation of income among partners. Rare is the firm that has not allocated increasingly large shares of income to more "productive" partners at the

III. PARTNER AS STATUS

Accordingly, substantive principles from different sources of law govern the two groups that operate within the firm. For the employee group, the agency model shapes the relationship between the employee and the firm (i.e., the partnership), establishes the rights and duties that run from the employee to the firm, delimits the authority of the employee to act for the firm, and addresses the methods and consequences of a termination of the relationship. The model generally operates vertically rather than horizontally. That is to say, agency law addresses the vertical relationship between the employee and the firm,⁶ but it scarcely, if at all, treats any relationship that may exist among the employees of the firm.⁷ Indeed, it is difficult to find in agency law support for the idea that a relationship exists *among* the employee participants in a law firm.

Contrast the largely vertical model of agency law with the model of partnership law that operates on both vertical and horizontal levels. Like agency law, partnership law speaks to the vertical relationship that exists between each partner and the partnership as a whole. To a far greater extent than agency law, however, partnership law also defines the nature of the relationship that exists among members of the partner group.⁸ Along this line, an entire chapter of RUPA covers "Relations of Partners to Each Other and to Partnership."⁹ RUPA makes clear that the duties of loyalty and care run from each partner to the partnership and the other partners,¹⁰ that actions in law or equity may be maintained by a partner against the partnership or another partner,¹¹ and that the obligation to provide a partner with

expense of their "less productive" colleagues. The key, of course, is how one defines productivity, and who does the defining.

6. Agency law also addresses relationships between the principal (firm) and third parties, as well as between the agent (firm member) and third parties.

7. See, e.g., Restatement (Second) of Agency § 359 (1957) (stating that "[t]he liability of a servant or other agent to a fellow servant or other agent employed by the [same] employer is the same as to third persons").

8. Certainly, there exists some slight tension between the two branches of law on this point. The Restatement (Second) of Agency defines a partnership using the definition provided by the Uniform Partnership Act. See Restatement (Second) of Agency § 14A (1957). Commentary to this provision offers the following observation:

The rules concerning the creation of a partnership and the rights of individual partners and of creditors upon the dissolution of the partnership are matters not dependent upon agency principles. However, the rights and liabilities of partners *with respect to each other* and to third persons are largely determined by agency principles.

Id. § 14A cmt. a (emphasis added). At least as to the relationship of partners *inter se*, however, agency principles are generally subordinated to the more specific principles of partnership law. See *infra* note 13.

9. Rev. Unif. Partnership Act [Art.] 4 (1996), 6 U.L.A. 60 (Supp. 1998).

10. See *id.* § 404, 6 U.L.A. 65.

11. See *id.* § 405(b), 6 U.L.A. 68.

information extends not just to the partnership but also to each partner.¹²

This is not to suggest that partnership law and agency law are more contradictory than complementary in the setting of the law firm partnership. Much of partnership law is drawn from agency law, which also serves to fill the gaps where partnership law is silent—as it often is.¹³ Still, partnership law fulfills a broader function than agency law in defining the relationships among members of the partner group.

In addition, partnership law differs substantively from agency law in several important respects. As one example of such a substantive difference, consider varying partnership law and agency law approaches to the termination of the relationships they govern. With very narrow exceptions, the agent serves at the will of the principal, who is free to terminate the relationship with the agent at any time.¹⁴ To state it directly, it is easy to terminate an agent. In the law firm setting, this means that the non-partner employees of the firm normally may be discharged summarily with a minimum of ceremony or consequences.

Terminating a partner, on the other hand, is a difficult, tricky, and potentially dangerous exercise.¹⁵ First, a partner may not be “fired” unless there exists a partnership agreement that specifically creates the power of expulsion.¹⁶ Absent such an agreement, removal of a partner requires the cumbersome procedure of dissolving the partnership, liquidating its assets and winding up its affairs, and forming a new partnership that does not include the partner targeted for removal.¹⁷ Even if there exists a partnership agreement authorizing expulsions, the removal of a partner is subject to a good faith standard

12. See *id.* § 403(c), 6 U.L.A. 63-64.

13. Agency law provides default norms applicable in the absence of more particular norms set forth in the uniform partnership acts. See Unif. Partnership Act § 4(3) (1914), 6 U.L.A. 250 (1995) (“The law of agency shall apply under this act.”); *id.* § 4 cmt., 6 U.L.A. 250 (“This act is a partnership act and not an act relating to agency or any branch thereof.”); *id.* § 5, 6 U.L.A. 254 (“In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern.”); see also Rev. Unif. Partnership Act § 104(a) (1996), 6 U.L.A. 36 (Supp. 1998) (“Unless displaced by particular provisions of this [Act], the principles of law and equity supplement this [Act].”); *id.* § 104 cmt., 6 U.L.A. 36 (the supplementary principles encompass, in part, “the law of agency and estoppel”).

14. See, e.g., Restatement (Second) of Agency § 118 (1957) (“Authority terminates if the principal or the agent manifests to the other dissent to its continuance.”).

15. On law firm expulsions, see Hillman, Lawyer Mobility, *supra* note 1, § 5.3; Allan W. Vestal, “Assume a Rather Large Boat . . .”: *The Mess We Have Made of Partnership Law*, 54 Wash. & Lee L. Rev. 487 (1997); Donald J. Weidner, *Cadwalader, RUPA, and Fiduciary Duty*, 54 Wash. & Lee L. Rev. 877 (1997).

16. See Unif. Partnership Act §§ 31(1)(d), 38(1) (1914), 6 U.L.A. 771, 880 (1995) (referencing expulsions that are bona fide under the partnership agreement); Rev. Unif. Partnership Act § 601(3) (1996), 6 U.L.A. 74 (Supp. 1998) (referencing dissociation caused by expulsion pursuant to partnership agreement).

17. See generally Hillman, Lawyer Mobility, *supra* note 1, § 5.4.1 (describing procedure for dissolution and formation of a new partnership).

and may not be implemented for a "predatory" purpose.¹⁸ Removing a partner, in short, is a far more difficult activity than removing an employee, a distinction explained by varying principles of agency and partnership laws.¹⁹

The differing treatment of terminations of partners and employees is only partly explained by status. Unlike an employee, a partner is a co-owner of the firm, a status in law that necessarily complicates the removal of a partner. Care should be taken, however, not to overstate the significance of a partner's status as an owner. In many firms, the structure of the partnership is hierarchical, with junior partners having so little influence and such a marginal interest in firm assets and profits that they closely resemble employees of the firm.²⁰ Indeed, senior associates and junior partners may, from a functional perspective, be indistinguishable.

Also complicating a simple distinction between partner and employee is the proliferation of classes of partners and the creation of new types of partnership interests. The most notable example of this is the "non-equity" or "salaried" partner.²¹ A partner without an equity interest is obviously a contradiction in terms. Yet the ambiguity of such a status has not deterred firms from developing tiered partnerships and assigning a growing number of their lawyers to a position that could best be described as that of a "non-partner partner." The development of different levels of partner status within a firm is one example of how the modern law firm has outgrown the law of partnerships.²²

IV. THE PARTNERSHIP AS GROUP: THE FIDUCIARY NORM AND CLIENT LOYALTIES

Further evidence of a growing gap between the law of partnerships and the reality of the law firm may be seen in the application of fiduci-

18. See, e.g., *Lawlis v. Kightlinger & Gray*, 562 N.E.2d 435, 440-41 (Ind. Ct. App. 1990) (agreeing that expulsion may not be for a "predatory" purpose, but finding no such purpose in the case before the court). On the predatory purpose standard, see Hillman, *Lawyer Mobility*, *supra* note 1, § 5.3.4.3.

19. The difficulties of removing a partner are in contrast with the ease with which voluntary withdrawal of a partner may be accomplished. See *infra* notes 48-55 and accompanying text.

20. See generally Robert W. Hillman, *Private Ordering Within Partnerships*, 41 U. Miami L. Rev. 425 (1987) (describing highly structural partnerships).

21. Other labels commonly used include income partners, non-percentage partners, contract partners, and junior partners. See Alexander Stille, *Turning to 2-Tiered Partnerships*, Nat'l L.J., Oct. 22, 1984, at 1.

22. The tiering of law partnerships began in earnest in the 1980s. By 1990, 42 out of the 77 of the largest firms had adopted two-tier partnership structures. See Peter Giuliani, *Amending Traditional Partnerships: Two-Tiered System Offers Associates Alternative Path*, N.J. L.J., May 17, 1990, at 16. A 1994 study showed that nearly half (124) of the 250 largest U.S. law firms reported having non-equity partners. See *Non-Equity Partners*, Partner's Rep., Nov. 1994, at 14, 14-15.

ary standards firmly grounded in partnership law. "Undivided loyalty"²³ and the "highest good faith"²⁴ are the common expressions of the standard partners are expected to observe in their relations with each other. Indeed, Cardozo's celebrated "punctilio of an honor the most sensitive"²⁵ statement was recently affirmed by the Missouri high court as a standard that "still controls" the duties law partners owe each other.²⁶

A. *Loyalty and the "Revolving Door"*

If undivided loyalty is the present standard, however, how can one begin to explain the frequency with which partners plan and execute withdrawals from firms, clients in hand, to the great detriment of the firms they are leaving? For many firms, present partners represent significant future competitors. The extent of the turnover of partners in law firms has prompted the New York Court of Appeals to describe the "revolving door" as "a modern-day law firm fixture."²⁷ That such "grabbing and leaving" activities²⁸ are so well-established in the profession is evidence of a significant gap between the law of partnerships and the law under which law partnerships operate.²⁹

Two reasons may explain, at least in part, the dilution of fiduciary standards in partnership law. The first lies in the standard itself. As applied to partnerships, the fiduciary standard is a borrowed and ill-fitting doctrine. A fiduciary is an individual who is expected to serve the interests of another individual without compromise.³⁰ Perhaps the classic model comes from the law trusts and the relationship between trustee and beneficiary. In the trust setting, the trustee's loyalty obligations are absolute and normally may be discharged without cost to the trustee. In contrast, a partner's interest will often conflict with that of another partner, or the partnership itself, particularly on issues concerning the division of a firm's income. The inevitability and prev-

23. *Graubard Mollen Horowitz Pomeranz & Shapiro v. Moskovitz*, 565 N.Y.S.2d 672, 674 (App. Div. 1990), *aff'd sub nom. Graubard Mollen Dannett & Horowitz v. Moskovitz*, 653 N.E.2d 1179 (N.Y. 1995).

24. *Page v. Page*, 359 P.2d 41, 44 (Cal. 1961).

25. *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928).

26. *In re Cupples*, 952 S.W.2d 226, 235 (Mo. 1997).

27. *Graubard*, 653 N.E.2d at 1180.

28. The phrase "grabbing and leaving" is used to describe the movement of partners from firm to firm, clients in hand. On origins of the phrase, see Hillman, *Lawyer Mobility*, *supra* note 1, § 1.1.

29. I have suggested elsewhere that fiduciary standards remain alive largely to regulate the process of withdrawal from a law firm rather than to enforce loyalty obligations running among partners. See Robert W. Hillman, *Loyalty in the Firm, A Statement of General Principles on the Duties of Partners Withdrawing from Law Firms*, 55 Wash. & Lee L. Rev. (forthcoming 1998) [hereinafter Hillman, *Loyalty in the Firm*].

30. "Fiduciary" is from the Latin word *fiduciarius*, which is derived from *fiducia*, meaning confidence or trust. See 5 Oxford English Dictionary 878 (2d ed. 1989).

alence of such conflicts in the partnership setting render impossible rigid application of fiduciary standards.³¹

A second problem with regulating the relations of law partners through fiduciary standards may be found in another type of conflict—the duty owed by a lawyer to the client, discussed below.

B. *Dueling Loyalties and the Multiple Masters Conundrum*

The relationship between lawyer and client is fiduciary in character,³² which means that a law partner owes fiduciary obligations grounded in partnership law to other partners and fiduciary obligations grounded in ethics norms to clients. A lawyer as fiduciary serves two masters—the lawyer's partners and the lawyer's clients. The differing interests of the beneficiaries of a partner's loyalty obligation may diverge significantly and even be in conflict. Conflicting loyalties under a standard requiring undivided loyalty signals a standard that cannot survive rigid application.

One long-standing example of such a conflict is seen in the prophylactic measures partners may wish to take to restrain future grabbing and leaving activities by their colleagues. On the assumption that fiduciary duties do not restrain future competition by present fiducia-

31. *Starr v. Fordham*, 648 N.E.2d 1261 (Mass. 1995), offers a recent illustration of the problem. A partner withdrew from a firm that operated under an agreement giving the founding partners the authority to determine each partner's share of profits. Not surprisingly, the allocation to the then-departed partner was not generous. Invoking the implied covenant of good faith and fair dealing, the Massachusetts high court sustained the lower court's findings of a breach of fiduciary duty. It reasoned:

The test to be applied when one partner alleges that another partner has violated his duty of strict faith is whether the allegedly violating partner can demonstrate a legitimate business purpose for his action. . . . Nevertheless, the business judgment rule does not apply if the plaintiff can demonstrate self-dealing on the part of the allegedly wrongdoing partner. . . . *A court has the power to determine whether a partner's share of the profits is fair and equitable as a matter of law.*

Id. at 1266 (emphasis added) (citations omitted).

The difficulty with this analysis is that profit allocations are fundamentally exercises in self-dealing. Income not allocated to one partner is available to other partners, including the partners who are doing the allocating. *Starr* invites judicial intervention in common disputes over income allocation, but it is questionable whether this invitation will be, or should be, widely accepted by courts. For an evaluation of *Starr*, see Hillman, *Lawyer Mobility*, *supra* note 1, § 4.9.

32. Consider the following statement:

A lawyer is a fiduciary agent, to whom clients entrust matters, property, and information, which may be of great importance and sensitivity, and whose work is usually not subject to detailed client supervision because of its complexity. Because those characteristics of the client-lawyer relationship make clients vulnerable to harm, and because of the importance to the legal system of faithful representation, the law stated in this Chapter provides a number of safeguards for clients beyond those generally provided to principals.

Restatement (Third) of the Law Governing Lawyers, ch. 2, introductory note, at 1 (Proposed Final Draft No.1, 1996).

ries, partners sometimes seek a contractual means of limiting competition by including restrictive covenants in their partnership agreements. Such arrangements are common in associations of such professionals as physicians, accountants, and engineers.³³ Yet for more than three decades, ethics norms have stricken covenants among lawyers that restrain competition as impeding the right (near absolute) of clients to choose their lawyers.³⁴ The ban on restrictive covenants reveals that the ties that bind clients and lawyers (grounded in ethics norms) are stronger than those that bind partners associated in law practice (grounded in partnership law).

Given the relative clarity of the ban on restrictive covenants and the certainty of its application, the extent of litigation over these arrangements at first glance is surprising. The stakes are high, however, as firms strive to protect what they regard as firm assets in the form of clients. Challenges facing firms on this score are substantial, for the desire of firms to employ contractual restraints on competition is evidence that such restraints are indeed needed by the firms. Firms fear future competition from present partners because they doubt the loyalty of firm clients. Their concern indeed is sensible in light of the tendencies of many clients to view their relationships as extending to particular lawyers rather than the firms with which the lawyers are associated.³⁵

33. The "overwhelming weight of modern authority" allows enforcement of restrictive agreements "where a restriction is necessary to protect either trade secrets or the goodwill of the employer's business where the employee had significant customer contact." Milton Handler & Daniel E. Lazaroff, *Restraint of Trade and the Restatement (Second) of Contracts*, 57 N.Y.U. L. Rev. 669, 730 (1982) (footnote omitted). Most jurisdictions enforce noncompetition covenants between professionals such as physicians, accountants, and engineers. See, e.g., *Wolf & Co. v. Waldron*, 366 N.E.2d 603 (Ill. App. Ct. 1977) (enforcing a noncompetition agreement between accountants); *Medtronic, Inc., v. Sun*, No. C7-97-1185, 1997 WL 729168 (Minn. Ct. App. Nov. 25, 1997) (enforcing a restrictive covenant against an engineer); *Ireland v. Franklin*, 950 S.W.2d 155 (Tex. App. 1997) (upholding noncompetition covenant in agreement between physicians).

34. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1072 (1968) ("[A]ttorneys should not engage in an attempt to barter in clients, nor should their practice be restricted. The attorney must remain free to practice when and where he will and to be available to prospective clients who might desire to engage his services."). Both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct prohibit partners from contracting to restrain competition upon termination of their relationships. See Model Code of Professional Responsibility DR 2-108(A) (1981); Model Rules of Professional Conduct Rule 5.6 (1998). On contractual restraints to competition, see Hillman, *Lawyer Mobility*, *supra* note 1, § 2.3.

35. See Hillman, *Loyalty in the Firm*, *supra* note 29 (manuscript at 32, on file with the *Fordham Law Review*); cf. Susan Saab Fortney, *Are Law Firm Partners Islands Unto Themselves? An Empirical Study of Law Firm Peer Review and Culture*, 10 Geo. J. Legal Ethics 271, 308 (1996) (citing a survey of Texas lawyers revealing 54% of the respondents "believe clients hire individual attorneys and not law firms" (footnote omitted)).

C. "Institutionalizing" Clients

As an alternative to restrictive covenants that operate to restrict client choice, a firm may seek to "institutionalize" client relationships.³⁶ The success of such efforts will depend upon the support of the very partners to whom the clients are presently loyal. Is that support required by virtue of their status as fiduciaries? Can duties to the firm be the basis for a "mandatory" sharing of clients with other partners in the firm? Do the wishes of the clients need to be considered in this regard, and if so, is it not likely many clients would prefer the status quo over sharing policies that may introduce inefficiencies and greater costs borne by clients?

These questions have no easy answers, if they have answers at all, but they do at least illustrate the difficulty of applying a one-dimensional fiduciary analysis grounded in partnership law in a multi-dimensional setting where consumers of legal services exist and have well defined interests clearly recognized in law. At the least, it can be said that the weakened fiduciary norms of partnership law enable individual partners to pursue self-enrichment activities—such as the hoarding of clients—at the expense of their colleagues.

D. Pricing Past Loyalties: Post-Withdrawal Income Sharing

Elements of partnership law independent of fiduciary standards also may operate to enhance the position of the individual partner at the expense of the partnership. Consider in this regard partnership law's mandates concerning the sharing of income generated following the withdrawal of a partner.³⁷ At least for income sharing purposes, both UPA and RUPA provide for the continuation of the relationship that exists among partners until the cases pending at the time of the withdrawal of a partner are brought to a conclusion.³⁸ Income de-

36. A few partnership agreements create duties to institutionalize clients. In *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 653 N.E.2d 1179 (N.Y. 1995), the agreement provided: "The partners recognize that efforts towards institutionalization of the business of the firm is essential to the firm's continuing prosperity. In particular, the partners approaching phase-down and retirement will integrate, to the extent possible, relationships between the firm's clients and the other partners." *Id.* at 1181. Concluding that summary judgment on the enforceability of the clause would be inappropriate, the New York Court of Appeals observed the "best efforts" obligation did not compromise the freedom of clients to choose their counsel. *Id.* at 1184. It added: "Given Moskovitz's insistence that the client looked only to him, and would never have remained with the firm after his departure, whether the promised 'best efforts' were in fact used is a disputed issue that must be determined at trial." *Id.*

37. Partners are free to include in their partnership agreements provisions concerning the allocation of post-withdrawal income, provided the agreements do not prejudice clients. In the absence of such agreements (a situation assumed for purposes of this discussion), the "default provisions" of statutory law apply.

38. See Unif. Partnership Act § 30 (1914), 6 U.L.A. 756 (1995); Rev. Unif. Partnership Act § 802 (1996), 6 U.L.A. 91 (Supp. 1998).

rived from this "unfinished business" is shared on the same basis and in the same ratios that income was shared prior to the withdrawal.³⁹ As discussed below, partners historically have not been entitled to additional compensation for their work in completing unfinished business.⁴⁰

The operative effect of the income sharing principles is dependent upon the type of practice involved. If the unfinished business consists of contingent fee tort cases, a potentially long period of income sharing may follow until the cases are brought to a conclusion. When the departing lawyer's practice consists of ongoing representation of clients rather than a portfolio of defined litigation matters, on the other hand, the business pending at the time of withdrawal may be concluded rather promptly, with new matters from existing clients escaping entirely the income sharing requirements of partnership law. The partner with a practice consisting of such short-term assignments from clients for which the partner provides ongoing representation may remove the practice from the firm at a far lower cost to the partner than if the practice consists of longer-term, clearly defined engagements.⁴¹

To illustrate, assume Partner *A* handles the real estate work for a Fortune 500 company. Partner *B* has a tort practice consisting of a few contingent fee cases in early stages of development. Each partner leaves the firm. The unfinished business relating to *A*'s practice will normally consist of those matters presently pending for the client. This may mean *A* shares income relating to drafting an office lease or closing an acquisition for the client, but the burden is not great because each of the matters is brought to a conclusion in a reasonably short period of time. A new matter given to *A* by the client after *A*'s withdrawal normally will not be unfinished business requiring income sharing with the former partners. Partner *B*, in contrast, has taken a substantial portfolio of unfinished business from the firm that may require long-term efforts to bring to completion. Because of the differences in their practices, *B*'s income sharing burdens are far greater than those borne by *A*. Other factors being equal, *A* has the more portable practice and is the more mobile lawyer.

The income-sharing disincentives associated with taking contingent fee cases from a firm may be alleviated somewhat by one little noticed change in RUPA likely to further undermine the collegial model of the partnership suggested by fiduciary norms. Under traditional principles of partnership law, no partner is entitled to special compensa-

39. See Hillman, *Lawyer Mobility*, *supra* note 1, §§ 4.6-4.7.

40. See *infra* notes 42-47 and accompanying text.

41. *But cf.* Rothman v. Dolin, 24 Cal. Rptr. 2d 571, 572 (Ct. App. 1993) (suggesting it is both desirable and possible to treat hourly and contingent fee matters the same in order to discourage the taking of hourly cases).

tion for winding up activities.⁴² Income derived from the completion of cases pending at the time a partner withdraws from a firm is divided among the original partners without special compensation given to the partners who actually complete the cases.⁴³

The assumption underlying the "no-compensation rule" applied to winding up activities is that compensation is unnecessary because a withdrawing partner performing services will share in the income derived from other partners performing their services. In practice, of course, the contributions of former partners may be substantially disproportionate to the income they receive under the sharing model implicit in the no-compensation rule.⁴⁴ When fees shared by a departing partner with the firm are proportionately greater than fees shared by the firm with the departing partner, a disincentive may exist to the taking of cases and the ability of clients to choose their lawyers may be undermined.⁴⁵

RUPA, however, removes the disincentive by abandoning UPA's no-compensation principle in favor of "reasonable compensation" for winding up activities.⁴⁶ To return to the illustration above, Partner B may, under RUPA, claim compensation for the post-withdrawal services performed in bringing the contingent fee cases to conclusion.⁴⁷ By allowing compensation for work on cases taken from a firm, RUPA may intensify efforts on the part of individual partners to control cases and resist the sharing of clients with other members of the firm. The commentary accompanying the RUPA provision is sparse,

42. See Unif. Partnership Act § 18(f) (1914), 6 U.L.A. 526 (1995) (excepting only the surviving partner who winds up affairs following the death of a partner).

43. See, e.g., *Flynn v. Cohn*, 607 N.E.2d 1236, 1237 (Ill. 1992) (involving dissolution of two-partner firm, with one partner winding up cases generating \$531,233 in fees and the other partner winding up cases generating only \$37,000 in fees).

44. Cf. Mark H. Epstein & Brandon Wisoff, Comment, *Winding Up Dissolved Law Partnerships: The No-Compensation Rule and Client Choice*, 73 Cal. L. Rev. 1597, 1599-1600 (1985) (noting that because of the absence of compensation attorneys may be unwilling or unable to complete matters on which they had previously worked).

45. A similar problem arises when partnership agreements provide for unequal sharing of post-withdrawal fees by requiring a former partner to remit all or a large part of such fees to the firm without requiring the firm to share fees with the former partner. See, e.g., *Howard v. Babcock*, 7 Cal. Rptr. 2d 687, 693 n.8 (Ct. App. 1992) (noting that the effect of application of the agreement was that former partner earned \$5.10 per hour for 15,917 billable hours attributable to cases taken from the firm), *aff'd in part, rev'd in part*, 863 P.2d 150 (Cal. 1993). For a discussion of one-sided fee sharing, see Hillman, *Lawyer Mobility*, *supra* note 1, § 2.3.4.4.

46. See Rev. Unif. Partnership Act § 401(h) (1996), 6 U.L.A. 61 (Supp. 1998) ("A partner is not entitled to remuneration for services performed for the partnership, except for reasonable compensation for services rendered in winding up the business of the partnership.").

47. RUPA does not offer guidance on how reasonable compensation is to be determined. For a discussion of compensation standards and the relationship of quantum merit to partnership law's income-sharing principles, see Hillman, *Lawyer Mobility*, *supra* note 1, §§ 2.3.1.2-4.

and it is not clear that the RUPA drafters intended this result (or any result at all).

V. THE PARTNERSHIP AS GROUP: EASY EXIT AND FIRM STABILITY

Fiduciary standards that do not operate to subordinate the individual partner's interest in clients to the interest of the firm in the same clients are consistent with withdrawal and dissolution provisions of partnership law that serve to support the grabbing and leaving activities of law partners.

An ancient precept of partnership law is that a partner may dissolve the partnership at any time through a mere expression of will to this effect.⁴⁸ A withdrawal from a law partnership is an act that dissolves the partnership. Under UPA, this simple proposition knows few qualifications. RUPA limits free dissolvability somewhat by allowing fixed-term partnerships to survive, without dissolution, the withdrawal of a partner. Even RUPA, however, maintains free dissolvability for at-will partnerships,⁴⁹ a status under which virtually all law partnerships fall.⁵⁰ Moreover, neither UPA nor RUPA allows specific enforcement of a contractual commitment to remain in a partnership.⁵¹

Firms are free to continue through new partnerships formed (sometimes automatically) following the withdrawal of a partner.⁵² To outward appearances, the withdrawal of a partner and dissolution of the partnership may seem to have no impact on the continuity of the firm and its practice. As between the withdrawing partner and the firm, on the other hand, the effect of the dissolution of the original partnership

48. See Unif. Partnership Act § 31(1)(b), (2) (1914), 6 U.L.A. 771 (1995).

49. See Rev. Unif. Partnership Act § 801(1) (1996), 6 U.L.A. 87 (Supp. 1998). Unlike UPA, RUPA allows partners to change this result by including an anti-dissolution provision in their partnership agreement. For a discussion of this point, see Robert W. Hillman et al., *The Revised Uniform Partnership Act 292* (1998). This book was co-authored by Allen W. Vestal and Donald J. Weidner.

50. Virtually all law partnerships are at-will rather than fixed term partnerships. See generally Hillman, *Lawyer Mobility*, *supra* note 1, § 4.3.4 (discussing consequences of establishing fixed-term partnerships). This distinction may be particularly important under RUPA, which generally provides for the continuation of a fixed term partnership following the withdrawal of a partner. See Rev. Unif. Partnership Act § 801(2) (1996), 6 U.L.A. 87 (Supp. 1998).

51. Agency theory may explain why partners are free to withdraw, even if the departure is in violation of an agreement among the partners. Because of the liability of partners for the acts of each other, a policy of "easy exit" may be essential for allowing a partner to terminate an unsatisfactory and potentially dangerous relationship. See generally Robert W. Hillman, *Indissoluble Partnerships*, 37 U. Fla. L. Rev. 691 (1985) (evaluating the policy of free dissolvability). The policy has not been reevaluated since the advent of limited liability partnerships, which limit the liability risks associated with acts of fellow partners. See *infra* notes 60-72 and accompanying text.

52. See, e.g., *Dawson v. White & Case*, 672 N.E.2d 589 (N.Y. 1996) (describing a technique used to remove a single partner from a large firm was to dissolve the partnership and form a new partnership that excluded the targeted partner).

is to define *and limit* reciprocal claims to post-withdrawal income by the firm and its former partner.

Dissolution (i.e., withdrawal) is the point at which the relationship enters the winding up phase of its existence, with claims to income subsequently generated limited to matters properly classified as unfinished business, or work in progress, at the time of withdrawal. As is discussed above,⁵³ the nature of some practices is such that considerable unfinished business may be taken from their firms by withdrawing partners. In such cases, the income-sharing costs associated with withdrawal are likely to be substantial and may represent a major qualification to the easy exit policy of partnership law. Conversely, when unfinished business attributable to clients taken is slight or nonexistent, the costs disappear, and the easy exit policy of partnership law is given full effect.⁵⁴

Complementing partnership law's easy exit policy are developments in legal ethics that support departing partners at the expense of their firms. In particular, the well-established bans on both restrictive covenants and economic disincentives to competition by former partners, discussed above,⁵⁵ significantly limit the ability of a firm to protect through contractual means its client base. Indeed, it is often the case that the only goodwill associated with a firm is the individual goodwill of one or more of the partners. Given the legal norms under which law partnerships operate, the ease with which partners may leave their firms, and the indifference of many clients to firm stability, it should not be surprising that firm goodwill is a nonexistent or dissipating asset in many firms.

VI. THE PARTNERSHIP AS GROUP: THE MONITORING FUNCTION AND CLIENT WELFARE

A. *Monitoring and the Firm*

Monitoring is an activity of cohesion that connects the disparate practices of lawyers associated in a firm and serves to distinguish a law

53. See *supra* note 41 and accompanying text.

54. Of course, other costs may be borne by the former partner. Liability may continue for extended periods on major contracts of the firm, such as the office lease or bank financing. In addition, the withdrawal from a firm may not in itself extinguish liability for malpractice of the firm, even if the malpractice occurs long after the withdrawal. See, e.g., *Palomba v. Barish*, 626 F. Supp. 722, 726 (E.D. Pa. 1985) (asserting that mere fact that attorney was not member of partnership at time of former partner's purported negligence did not preclude assertion of client's claim against attorney); *Redman v. Walters*, 152 Cal. Rptr. 42, 46 (Ct. App. 1979) (remanding after determining that fact issue remained as to whether client was estopped to assert that attorney, who had severed relationship with defendant law firm after client had hired law firm, remained liable for law firm's alleged negligence).

55. See *supra* notes 33-34 and accompanying text.

firm from a loose confederation of lawyers.⁵⁶ The mechanisms of monitoring may take many forms beyond simply supervising present work, including elaborate screening activities in hiring and lengthy "partnership tracks" for associates.⁵⁷ The development of a sound firm infrastructure is encouraged, if not required, by underwriters of malpractice insurance, who view monitoring within firms they insure as a means of reducing the frequency of malpractice claims.⁵⁸

Theory would suggest the liability provisions of partnership law that render a partner vicariously responsible for the practice misdeeds of another partner⁵⁹ should promote the development of monitoring and control mechanisms within firms to insure that services provided to clients meet the standards of the profession. If fear of vicarious liability explains monitoring, one would expect a reduction in the risk of liability to result in decreased levels of monitoring. The theory, which offers much in logic, is about to be tested in practice.

B. *Monitoring and Limited Liability: The Impact of LLPs*

The recent development of new limited liability vehicles has prompted much debate concerning the effect of limiting or eliminating

56. Under a confederation-type association, "each lawyer develops individual client relationships. . . . The office exists merely to facilitate each lawyer's practice. . . . [It] is not, however, central to the work the lawyer performs for clients. There is no need for substantial collaboration or cooperation among partners." Altman & Weil, Inc., *Compensation Plans for Lawyers and Their Staffs: Salaries, Bonuses, and Profit-Sharing* 7 (1986). Moreover, there is minimal monitoring because "each lawyer is viewed as a master of his or her craft and is permitted to practice with little supervision or accountability." *Id.*; see also Fortney, *supra* note 35, at 307 (noting that attorneys with a confederation preference "are more likely to practice in firms that have not implemented peer review measures").

57. See George M. Cohen, *Legal Malpractice Insurance and Loss Prevention: A Comparative Analysis of Economic Institutions*, 4 Conn. Ins. L.J. 305, 347 (1997). As a firm grows in size, its members may benefit from improved diversification against risks, including single-client malpractice claims. *Cf. id.* ("Partnerships engage in all of the risk reduction methods that market insurers do, including diversification. Although market insurers may provide more diversification, large law partnerships are close to, if not greater than, the size of some mutual malpractice insurers."). For an analysis of the benefits of diversification offered by the law firm structure, see Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 Stan. L. Rev. 313 (1985).

58. See Ted Schneyer, *A Tale of Four Systems: Reflections on How Law Influences the "Ethical Infrastructure" of Law Firms*, 39 S. Tex. L. Rev. 245, 272-73 (1998) (noting that malpractice insurance firms have become "major players in the development of sound infrastructure"); see also Fortney, *supra* note 35, at 292-306 (noting that obstacles to peer review include lawyer autonomy, absence of standards, administrative costs, resistance to utilization of peer review results, and discovery problems).

59. See, e.g., Unif. Partnership Act §§ 13-14 (1914), 6 U.L.A. 444-55 (1995) (discussing joint and several liability for wrongful acts or breach of trust); Rev. Unif. Partnership Act § 306(a) (1996), 6 U.L.A. 54 (Supp. 1998) (discussing joint and several liability for all obligations of partnership).

vicarious liability on the quality of services provided to clients.⁶⁰ One of these vehicles—the limited liability partnership (“LLP”)—radically alters the liability provisions of partnership law and has become a dominant form of association for law firms.⁶¹ At least under the RUPA version of this new associational form, registration as an LLP creates a full shield against liability, “whether arising in contract, tort, or otherwise”⁶²

In practice, what appears to be a full shield against liability may be penetrated with a focused blow. Partners remain liable for their own misdeeds and, in a substantial number of jurisdictions, the errors and omissions of those under their direct supervision.⁶³ Moreover, a form

60. There is a growing body of commentary in law reviews about law firm LLPs. See, e.g., Allison L. Bergman, *Covering Your Assets: Missouri's New Limited Liability Partnership Law*, 63 U. Mo. Kan. City L. Rev. 679 (1995); John S. Dzienkowski, *Legal Malpractice and the Multistate Law Firm: Supervision of Multistate Offices; Firms as Limited Liability Partnerships; and Pre-dispute Agreements to Arbitrate Client Malpractice Claims*, 36 S. Tex. L. Rev. 967 (1995); Susan Saab Fortney, *Seeking Shelter in the Minefield of Unintended Consequences—The Traps of Limited Liability Law Firms*, 54 Wash. & Lee L. Rev. 717 (1997); Robert W. Hamilton, *Registered Limited Liability Partnerships: Present at the Birth (Nearly)*, 66 U. Colo. L. Rev. 1065 (1995); Martin C. McWilliams, Jr., *Limited Liability Law Practice*, 49 S.C. L. Rev. 359 (1998); Larry E. Ribstein, *Possible Futures for Unincorporated Firms*, 64 U. Cin. L. Rev. 319 (1996). Similar attention has been given to LLPs in the popular legal press. See, e.g., Jennifer J. Johnson, *Limited Liability for Lawyers: General Partners Need Not Apply*, 51 Bus. Law. 85 (1995); Ronald E. Mallen, *Ethics/Malpractice Issues: The Professional and Ethical Issues Facing the Attorney-Employee*, in *The Best Entity for Doing the Deal* 993 (PLI Corporate Law and Practice Course Handbook Series No. 937, 1996); Edward A. Adams, *Firms Expected to Make Switch to New Format: Limited Liability Partnerships Seen Restricting Exposure*, N.Y. L.J., July 14, 1994, at 1; Kirsten L. Christophe, *Continuing Protection: Converting to a Limited Liability Structure Raises Key Insurance Issues*, A.B.A. J., Sept. 1995, at 92; Dave Lenckus, *Lawyers Should Beware LLP Pitfalls*, Bus. Ins., Nov. 27, 1995, at 29; Darryl Van Duch, *Some Firms Hesitate to Adopt L.L.P.: 'One for All, All for One' Trait of Partnerships is Shaken*, Nat'l L.J., May 5, 1997, at 1.

61. A 1995 survey of Texas law firms shows that the LLP form had been adopted by a majority of large firms. See Fortney, *supra* note 35, at 280.

62. Rev. Unif. Partnership Act § 306(c) (1996), 6 U.L.A. 54 (Supp. 1998); see Robert W. Hillman et al., *The Revised Uniform Partnership Act 137-41* (1998). This book was co-authored by Allen W. Vestal and Donald J. Weidner.

63. Many states have language in their LLP statutes holding partners liable for the misconduct of those under the partners' “direct supervision and control.” See, e.g., 805 Ill. Comp. Stat. 205/15-(c) (West Supp. 1998) (stating that a partner in a registered limited liability partnership is liable for his own negligence and for “that of any person under his direct supervision and control.”); N.Y. Partnership Law § 26(c) (McKinney Supp. 1998) (stating that a partner in a registered limited liability partnership “shall be personally and fully liable and accountable for any negligent or wrongful act or misconduct committed by . . . any person under his or her direct supervision and control while rendering professional services”). Some states impose supervisory liability by negative reference. See, e.g., Tex. Rev. Civ. Stat. Ann. art. 6132b-3.08(a)(2) (West Supp. 1998) (“A partner in a registered limited liability partnership is not individually liable . . . for debts and obligations of the partnership arising from errors, omissions, negligence, incompetence, or malfeasance committed . . . by another partner or representative of the partnership *not working under the supervision or direction of the first partner . . .*”) (emphasis added); see generally Carol R. Goforth, *Limiting*

of limited vicarious liability survives even in LLPs because assets of the partnership are available to satisfy claims against individual partners. When these assets are reached, the non-liable partners effectively have nonrecourse liability for even "fully shielded" obligations.⁶⁴

That said, it is true that the LLP may operate to reduce the liability risks of lawyers associated in law practice. To the extent that monitoring exists by virtue of the threat of liability, it is also *possible* that any contraction of liability will reduce incentives to have in place extensive monitoring and mentoring systems. Remove the threat of liability and you remove the need to keep in place expensive supervisory systems developed because of fear of liability, or so the argument goes.⁶⁵

the Liability of General Partners in LLPs: An Analysis of Statutory Alternatives, 75 Or. L. Rev. 1139, 1154 (1996) (noting how certain state LLP statutes "adopt an alternative verbal formulation addressing the liability of partners for the misconduct of others").

On liability for supervision, Professor Schneyer makes a very interesting point on the relationship between supervisory liability and firm controls. In his view, the existence of the former will encourage the development of the latter: "[T]o the extent that internal controls can serve as *substitutes* for direct supervision, and not merely as complements, principals in limited liability entities might find them even more valuable than do the partners in traditional law firm partnerships." Schneyer, *supra* note 58, at 275; see also Susan Saab Fortney, *Professional Responsibility and Liability Issues Related to Limited Liability Law Partnerships*, 39 S. Tex. L. Rev. 399, 421 (1998) ("To avoid [liability that may exist for direct supervision], partners may avoid service as mentors, managers, and supervisors simply because those roles could subject them to personal liability for others' acts or omissions."); Larry E. Ribstein, *Possible Futures for Unincorporated Firms*, 64 U. Cin. L. Rev. 319, 332 (1996). Professor Ribstein notes:

As long as all partners are vicariously liable for partnership debts they all have approximately equal incentives to minimize the firm's exposure to tort liability. But LLP partners may avoid monitoring that could trigger direct liability for participating in misconduct because their personal liability for participating in misconduct would exceed their partner's share of the firm's liability. Thus, specialists may refuse to learn about cases in which they are not directly involved, and partners may refuse to serve on committees that oversee high-risk activities such as issuing opinions.

Id.

64. On the nature of this nonrecourse liability and rights of contribution, see Robert W. Hillman et al., *The Revised Uniform Partnership Act 137-39* (1998). This book was co-authored by Allen W. Vestal and Donald J. Weidner.

65. See, e.g., Schneyer, *supra* note 58, at 270 ("[N]o regulatory system does more to promote the ethical infrastructure of law firms than civil liability."); Allan W. Vestal, *Special Ethical and Fiduciary Challenges for Law Firms Under the New and Revised Unincorporated Business Forms*, 39 S. Tex. L. Rev. 445, 475 (1998) ("Obviously, [limited liability] firm members who are not directly involved in a project have less incentive to supervise than they would in a general, nonlimited liability partnership setting, because their personal assets . . . are not at risk."); David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. Cal. L. Rev. 1147, 1213 (1993) ("[The] traditional rule that lawyers are vicariously liable for their partners' misdeeds encourages lawyers to view the law firm as a single entity. Without this rule, lawyers will have fewer incentives to devote time and resources to monitoring their partners' conduct and therefore less opportunity to detect and prevent misconduct.").

Interestingly, the sudden emergence of limited liability for lawyers has occurred during a time when other, unrelated forces also are working to reduce incentives for firms to monitor and train. The "revolving door" feature of many law firms,⁶⁶ client loyalties running to the lawyer rather than the firm, clear incentives to hoard rather than to share clients, allocations of income based on individual rather than group productivity, the proliferation of satellite offices, and relentless pressures to reduce the costs of providing legal services are among the factors undermining firm investment in establishing and maintaining monitoring and mentoring mechanisms.⁶⁷ As these trends merge with the narrowing of civil liability vicariously imposed, it is possible that firms will commit fewer resources to monitoring and mentoring activities.

Still, there are reasons to believe that the forces described above may not operate over time to dramatically change the level of monitoring activities within firms. First, insurance carriers continue to have strong incentives to police the ways the firms provide legal services and to price insurance based on presence of controls such as monitoring mechanisms. A partnership organized as an LLP remains, as a partnership, fully responsible for the claims of clients.⁶⁸ LLP status does not reduce the liability of the partnership itself, which means the need for insurance underwriters to insist on implementation of monitoring mechanisms is largely unaffected by conversion of a firm from a general partnership into an LLP.⁶⁹

66. See *supra* note 27 and accompanying text.

67. See Standing Comm. on Lawyers' Prof'l Liability, American Bar Ass'n, *Legal Malpractice Claims in the 1990s* 23-25 (1996). The ABA Standing Committee states: Many insurers noted a change in firm structure and the business of lawyering. Some firms are downsizing, and many are partnerships in name only. This means less intra-firm supervision, and greater individual responsibility for profitability. Some insurers are worried that economic pressures will cause lawyers to over-economize and cut corners on cases, take on unsuitable clients, and delegate too much responsibility to unsupervised associates. . . . Several insurers emphasized the ongoing economic pressures against law firms and the overabundance of lawyers. These trends, if continued, may generate unnecessary claims due to lack of mentorship and control within firms and the profession.

Id.

68. Cf. Rev. Unif. Partnership Act § 305(a) (1996), 6 U.L.A. 53 (Supp. 1998) ("A partnership is liable for loss or injury caused to a person . . . as a result of a wrongful act or omission . . . of a partner acting in the ordinary course of business of the partnership or with authority of the partnership.").

69. See, for example, Jett Hanna, *Legal Malpractice Insurance and Limited Liability Entities: An Analysis of Malpractice Risk and Underwriting Responses*, 39 S. Tex. L. Rev. 641 (1998), who states:

If the entity being insured by an insurer is itself a limited liability entity, there is no reason for the insurer to modify its assessment of the risk of suit based on limited liability status. Individual constituents of the organization might have reduced risk of loss as a result of limited liability status, but the exposure for the entity itself is the work of all the attorneys in the organization.

On a more fundamental level, it is not clear that fear of vicarious liability explains fully the existence of monitoring mechanisms put into place *prior* to the development of limited liability partnerships. Or, if firms have monitored largely because of the vicarious liability concern (as opposed to other factors such as the demands of insurance carriers and clients), then it would appear that they have overstated significantly the liability risks. Imposition of vicarious liability for malpractice claims has been a rare event, and the personal assets of partners have not been meaningfully at risk for the malpractice of their colleagues.⁷⁰ Bank debt of a firm and its office lease represent a far greater risk to the personal assets of most law partners than vicarious liability for malpractice claims.⁷¹

The important qualification to be noted pertains to the efforts of federal regulators during the late 1980s and early 1990s to reach Texas firms even remotely connected with the failure of financial institutions in that state, but even here there was surprisingly little in the way of forfeiture of personal assets by lawyers not directly involved in representing the institutions.⁷² Ironically, the aggressiveness of federal reg-

Id. at 645. Compare this with Mallen, *supra* note 60, who states:

Arguably, different structures, providing different levels of liability coverage to partners, should affect how insurers rate the risk. Insurers, however, continue to set rates and determine insurability according to traditional means. This is logical since the amount of insurance for the entity usually does not vary depending on the form of the entity. Moreover, the exposure for non-intentional conduct remains the same for the individual lawyers who committed the wrongful conduct.

Id. at 1001.

LLP status may reduce the risk of loss for a carrier if it provides coverage for prior affiliations of lawyers who change firms. See Hanna, *supra* note 69, at 645. For a discussion of prior affiliation coverage issues, see Hillman, *Lawyer Mobility*, *supra* note 1, § 4.11.3.

70. For an interesting case involving the vicarious liability of a former partner for malpractice that occurred long after the partner had withdrawn from the firm, see *Redman v. Walters*, 152 Cal. Rptr. 42 (Ct. App. 1979).

71. The RUPA LLP provisions limit contract, as well as tort, liability. See Rev. Unif. Partnership Act § 306(c) (1996), 6 U.L.A. 54 (Supp. 1998) ("An obligation of a partnership incurred while the partnership is a limited liability partnership, whether arising in contract, tort, or otherwise, is solely the obligation of the partnership."). One would expect parties who enter into substantial contracts with firms to demand, where appropriate, personal guarantees from partners, which would negate the effect of LLP status as to those claimants.

72. See, e.g., Hanna, *supra* note 69, at 652 ("The ultimate issue there was insurance. While some attorneys with direct liability were held personally responsible and forfeited personal assets, by and large the government was looking for additional insurance, and attorneys did not lose their personal assets because of vicarious liability."); see also Amy Stevens, *S&L Lawsuits Fail to Answer Questions on Ethical Standards*, Wall St. J., Oct. 29, 1993, at B12. Stevens argues:

Indeed, government lawyers freely concede that a major criterion for determining which cases to pursue and how much money to accept is the level of a firm's insurance coverage. "Particularly with attorneys, we have to make sure there will be some kind of recovery source that would justify bringing this kind of lawsuit," says RTC lawyer Thomas Hindes. For their part, firms

ulators had the unintended effect of spurring the development of limited liability partnerships for the purpose of making more difficult similar enforcement actions in the future.

C. Why Monitor?

It is possible, and perhaps even likely, that in a world that does not mandate monitoring by one means or another, firms nevertheless will voluntarily implement some monitoring mechanisms.⁷³ There are several reasons for this, but perhaps the most important have been well-stated by a lawyer/executive with a Texas insurance carrier:

The motivation to supervise is usually born of long-term profit motive, not fear of liability. Higher quality work product should ultimately result in greater economic return. . . . Firms which do not have a sufficient level of supervision through firm systems will ultimately make less money or break up. Even attorneys who loathe supervision will not long associate themselves with an entity that is perceived as providing low quality services due to the acts of a few bad apples. . . . [L]aw firm behavior is not shaped by limited liability status, but rather by the willingness of individual attorneys to submit to and to perform supervision and review.⁷⁴

If the point of profit as reason to monitor is lost on some firms, perhaps the loss of profit will make the point more clearly. Along this line, there is evidence that some clients prefer to retain firms that monitor the work of their lawyers,⁷⁵ and this fact alone may prompt implementation of voluntary monitoring mechanisms.⁷⁶

have little incentive to litigate when they know settlement payments come largely from insurers' pockets.

Id.

73. This is so even though independence (i.e., resistance to peer review and oversight) is a trait of many of the most successful lawyers.

74. Hanna, *supra* note 69, at 646. Hanna cites a survey published in 1992 (pre-LLP revolution) indicating large corporate clients are more likely to hire firms with systems in place to improve the quality of services. *See id.* at 646 n.22 (citing Nancy Blodgett, *More and More Law Firms Take the TQM Plunge*, Legal Mgmt., May/June 1993, at 6, 6).

75. *See, e.g.*, Fortney, *supra* note 63, at 414-19 (describing the results of the author's survey).

76. *Cf.* Anthony E. Davis, *Limited Liability for Lawyers*, Prof. Law., Aug. 1995, at 1, 6. Davis states:

[I]t is perfectly reasonable to suppose that a *sophisticated* client, given a choice between two otherwise equivalent and qualified firms . . . , one of which is a limited liability entity and one of which has retained the traditional joint and several liability, will select the firm where the potential for recovery—if things do not work out as planned—is greater.

Id. (emphasis added). As to less sophisticated clients, confusion is likely to exist over the consequences of various associational forms and their effect on liability. This concern was concisely stated by one commentator: "It is also foolish to believe that the majority of clients will understand what the designation at the end of the law firm name means in practice." Dzienkowski, *supra* note 60, at 985 n.82.

It is likely that the more pessimistic predictions concerning the probable effects of LLPs on client welfare are overstated. There are reasons firms monitor, mentor, and otherwise adopt quality control measures other than the fear of liability that may arise if they do not. It is unlikely that a firm converting to LLP status will dramatically alter the way it provides legal services to its clients. In fact, the competitive market for legal services may very well encourage the development of *cost-effective monitoring* keyed more to client satisfaction than fear of liability. Of course, all of this is pure speculation because it is far too early to evaluate the consequences of the LLP form on law firms and their clients.

D. Ethics Mandates and Firm Monitoring

Finally, it should be noted that lawyer conduct is regulated through a variety of legal doctrines and theories. Monitoring and supervising obligations are not the exclusive province of partnership law. In particular, protection of clients should be a major concern of those who articulate and enforce the responsibility standards of the profession.⁷⁷ Although one would expect norms of legal ethics to address precisely the duty of firms and their partners to monitor, there exists a surprising absence of authority in standards of professional responsibility requiring the maintenance of internal controls within firms.⁷⁸ Recently, however, New York has amended its ethics rules to impose supervisory duties on firms,⁷⁹ and it is conceivable that over time professional

77. Beyond partnership law and ethics norms, other areas of law may provide authority for imposing monitoring duties on firms and their partners. The obvious example is securities law. See, e.g., *In re Keating, Muething & Klekamp*, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,124, at 81,989 (July 2, 1979) (applying SEC Rules of Practice to require firms to adopt procedures ensuring information relevant to a securities filing is made available to the attorney responsible for the filing).

78. Rule 5.1(a) of the Model Rules of Professional Conduct requires partners to "make reasonable efforts to ensure that [their] firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct." Model Rules of Professional Conduct Rule 5.1(a) (1997). This standard, however, has not been used as authority for requiring internal controls. See Schneyer, *supra* note 58, at 250 ("[N]one of the many jurisdictions with Rule 5.1(a) in effect ever enforce the duty to maintain internal controls against lawyers in firms with more than two or three partners—the very firms in which internal controls seem most crucial."); see also *id.* at 253 ("The trouble is that Rule 5.1 was also born into a world in which only individual lawyers are subject to discipline, and never vicariously, even when they work in group-practice settings.").

79. In 1996, New York's Disciplinary Rules of the Code of Professional Responsibility were amended to require law firms to "adequately supervise, as appropriate, the work of partners, associates and nonlawyers who work at the firm." N.Y. Comp. Codes. R. & Regs. tit 22, § 1200.5 (1996). In recommending the amendment, a report by the Association of the Bar of the City of New York stated that imposing such duties on firms would improve the practice environment, promote self-government, enable the supervision of non-lawyers, overcome the difficulty of assigning blame to individual lawyers, provide disincentives to lawyers who encourage violations by other lawyers, and address organizational problems. See Henry J. Reske, *Promoting*

responsibility standards enforced through bar authorities will fill any void created by the contraction of the civil liability threat that may have existed under partnership law.

VII. CONCLUDING THOUGHTS

In these few pages, I have suggested some of the ways in which partnership law has affected the legal profession and the ways that lawyers provide services to their clients. Partnership law, of course, is not static, and it remains to be seen how two significant recent statutory changes will affect partnership practices. The first of the changes—the advent of the limited liability company⁸⁰—has been the subject of much fanfare and commentary that may overstate its actual importance to the profession and clients. The second of the changes—the elimination of the long-standing no-compensation rule for post-withdrawal services⁸¹—has received scant attention but potentially provides a significant incentive for intensified competition between law firms and their partners for the loyalty of clients.

Just as partnership law is not static, the partnership form of association is undergoing constant change. Sadly, partnership law today remains largely premised on a unitary, classic model of the partnership—that is to say, partnerships are collegial and egalitarian associations of partners as co-equals, with each partner actively participating in the management of the firm and sharing in its profits and losses. This premise cannot be further from the reality of modern law partnerships. Non-equity partners, non-voting partners, contract attorneys, part-time partners, of-counsel, branch offices as quasi-independent units within partnerships, mass layoffs of partners, and limited income sharing (not so elegantly described on the street as “you eat what you kill”) are among the concepts and activities increasingly prevalent but difficult to reconcile with the classic model of the partnership premised on the equality of partners.⁸² The simplicity of the structure suggested by law is defied by the complexity and diversity of modern law partnerships, which may suggest partnership law is losing its relevance to lawyers associated under the label “partnership.”

Better Supervision: N.Y. Bar Committee Recommends Ethics Rule Changes to Permit Law-Firm Sanctions, A.B.A. J., Oct. 1993, at 32. New Jersey also imposes duties directly upon law firms. See New Jersey Rules of Professional Conduct Rule 5.1(a) (1998) (“Every law firm and organization authorized by the Court Rules to practice law in this jurisdiction shall make reasonable efforts to ensure that member lawyer or lawyers otherwise participating in the organization’s work undertake measures giving reasonable assurance that all lawyers conform to the Rules of Professional Conduct.”).

80. See *supra* notes 60-72 and accompanying text.

81. See *supra* notes 42-47 and accompanying text.

82. See *supra* note 4 and accompanying text.

My comments have focused on the impact of partnership law on the legal profession. That the coin has two sides is an appropriate way to conclude this commentary. In the last decade, a disproportionate amount of partnership case law has involved disputes among lawyers who were once partners.⁸³ Litigation among former partners has sparked the development and refinement of partnership law, particularly in such important areas as fiduciary duties and competition with the firm, expulsions, and post-withdrawal obligations of firms and their former partners. Just as partnership law has affected law practice, the legal profession is shaping partnership law.

83. See, e.g., *Ehrlich v. Howe*, No. 92 Civ. 1079, 1995 U.S. Dist. LEXIS 1489 (S.D.N.Y. Feb. 7, 1995) (involving expulsions); *Vowell & Meelheim, P.C. v. Beddow, Erben & Bowen, P.A.*, 679 So. 2d 637 (Ala. 1996) (involving compensation for winding-up activities); *Heller v. Pillsbury Madison & Sutro*, 58 Cal. Rptr. 2d 336 (Ct. App. 1996) (involving expulsions); *Grossman v. Davis*, 34 Cal. Rptr. 2d 355 (Ct. App. 1994) (involving unfinished business and income sharing); *Rothman v. Dolin*, 24 Cal. Rptr. 2d 571 (Ct. App. 1993) (same); *Beckman v. Farmer*, 579 A.2d 618 (D.C. 1990) (involving the existence of partnership and dissolutions); *Beasley v. Cadwalader, Wickersham & Taft*, No. Cl-94-8646, 1996 WL 438777 (Fla. Cir. Ct. July 23, 1996) (involving expulsions and fiduciary duties), *aff'd in part and rev'd in part*, Nos. 96-3818, 97-2805, 97-0146, 97-380, 1998 WL 405919 (Fla. Dist. Ct. App. July 28, 1998); *Dowd & Dowd v. Gleason*, 693 N.E.2d 358 (Ill. 1998) (involving fiduciary duties); *Winston & Strawn v. Nosal*, 664 N.E.2d 239 (Ill. App. Ct. 1996) (involving expulsions); *Flynn v. Cohn*, 607 N.E.2d 1236 (Ill. App. Ct. 1992) (involving dissolutions); *Lawlis v. Kightlinger & Gray*, 562 N.E.2d 435 (Ind. Ct. App. 1990) (involving expulsions); *Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg*, 461 N.W.2d 598 (Iowa 1990) (involving dissolutions); *Starr v. Fordham*, 648 N.E.2d 1261 (Mass. 1995) (involving profit allocations and fiduciary duties); *Meehan v. Shaughnessy*, 535 N.E.2d 1255 (Mass. 1989) (involving fiduciary duties); *Schrempp & Salerno v. Gross*, 529 N.W.2d 764 (Neb. 1995) (involving dissolutions); *Dawson v. White & Case*, 672 N.E.2d 589 (N.Y. 1996) (involving existence of partnership goodwill, expulsions, and dissolutions); *Graubard Mollen Dannett & Horowitz v. Moskovitz*, 653 N.E.2d 1179 (N.Y. 1995) (involving fiduciary duties); *Bohatch v. Butler & Binion*, 41 Tex. Sup. Ct. J. 308 (1998) (involving expulsions).